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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

Estate of GERTRUDE C. DALEY, Deceased.	
RONALD DALEY, Petitioner and Appellant, v. GREGORY O'KEEFFE, as Administrator, etc., Objector and Respondent.	A123021 (San Francisco City & County Super. Ct. No. 262684)

Appellant, Ronald Daley (Ronald) appeals an order filed on August 1, 2008, authorizing payment of fees to Daniel Conrad (Conrad), the attorney representing respondent Gregory P. O'Keeffe (O'Keeffe), administrator of the estate of Gertrude C. Daley.

Ronald contends the trial court failed to allow for an adequate evidentiary hearing. He further contends the court abused its discretion because (a) fees it authorized did not benefit the estate, (b) California Rule of Court, rule 7.702 does not authorize retainer fees and (c) the fee amount is "unconscionable" and excessive in relation to the size of the estate.

We conclude the trial court did not abuse its discretion in determining the scope of the evidentiary hearing, or with respect to the award and amount of fees, and affirm the order.

I. FACTUAL AND PROCEDURAL BACKGROUND

This is the eighth appeal in this seemingly endless probate proceeding. We have exhaustively recited the history of this contentious proceeding in our prior opinions, and will not repeat it here.[1] Instead, we limit our summary to the facts and procedural history with respect to the challenged August 1, 2008 order.

On April 18, 2008, O'Keeffe, the administrator, filed a petition seeking authorization to pay Conrad's fees (third fee petition). The probate court had previously approved a fee petition for Conrad's services from April 1, 2005 to March 31, 2006 (first fee petition)[2] and another for services rendered between April 1, 2006 and February 28, 2007 (second fee petition).[3]

In the third fee petition, O'Keeffe sought authorization to pay Conrad $35,337.50 incurred with respect to appeals A113999 and A116232, and $79, 892.77 incurred between March 1, 2007 and March 31, 2008, with respect to eight different appeals or petitions and fees incurred in the preparation of the second fee petition. O'Keeffe also requested authorization to pay Conrad a $10,000 retainer with respect to then pending appeals A120213 and A120596 and for "such other and further relief as the court deems appropriate." Robin Rudderow, an attorney who worked for Conrad's law office, submitted a declaration in support of the third fee petition, attaching an itemized billing summary of services, and time expended.

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[1] The seven prior nonpublished appeals were: *O'Keeffe v. Daley* (Oct. 11, 2006, A109762), the consolidated cases, *Estate of Gertrude Daley; O'Keeffe v. Daley* (Jan. 7, 2008, A113999, A116232), *O'Keeffe v. Daley* (Apr. 29, 2008, A118233), *O'Keeffe v. Daley* (Sept. 16, 2008, A120213), *O'Keeffe v. Daley* (Oct. 28, 2008, A120596), and *O'Keeffe v. Daley* (March 27, 2009, A121671). The court takes judicial notice of these opinions. (See Evid. Code, §§ 452, subd. (d), 459.)

[2] This court affirmed the order granting the first fee petition in *Estate of Gertrude Daley; O'Keeffe v. Daley, supra,* A113999, A116232.

[3] This court affirmed the order granting the second fee petition in *O'Keeffe v. Daley, supra,* A120213.

The trial court set the initial hearing on the third petition for June 4, 2008. At that hearing, Judge John Dearman denied Ronald's request that he recuse himself and continued the matter to July 30, 2008, for a hearing on Ronald's objections to the third petition.

In violation of Local Rule, rule 14.6(B),[4] Ronald filed a "Response and Objection" to the third petition on the day of the hearing. He objected that (1) O'Keeffe, not Conrad, should have prepared the third petition and (2) the request for a $10,000 retainer was excessive because the amount in issue in the appeal was only $7,186, and Daley had retained counsel to prepare an opening and reply brief for only $1, 333. Despite the late filing of Ronald's objections, the court allowed him to present evidence on the condition Ronald limit the evidence to the two issues he raised in his written objections.

Although Ronald stated he wanted to question Conrad and Rudderow "on some of their charges," he never asked them any questions. Instead, he argued Conrad had spent too much time on appeal A12013 and on a request for extension of time, and generally challenged the amount of time spent on various tasks. The court listened to all of Ronald's arguments and took the matter under submission.

On August 1, 2008, the court filed its order authorizing O'Keeffe to pay Conrad the requested fees. Ronald subsequently filed a timely notice of appeal.

II. DISCUSSION

1. Standard of Review

This court reviews an order allowing the payment of litigation expenses under the abuse of discretion standard. (*Whittlesey v. Aiello* (2002) 104 Cal.App.4th 1221, 1230.) " ' "The term [judicial discretion] implies the absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. [Par.] To exercise the power of judicial discretion all the material facts in evidence must be known and considered, together also with the legal principles essential to an informed, intelligent and just

[4] All further rule references are to the Superior Court of San Francisco City and County Local Rules unless otherwise indicated.

decision." [Fn. omitted.]' [Citations.]" (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448-1449.)

Under the abuse of discretion standard, a " 'showing on appeal is wholly insufficient if it presents a state of facts, a consideration of which, for the purpose of judicial action, merely affords an opportunity for a difference of opinion. An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge. To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice. . . .' [Citation.]" (*Estate of Gilkison, supra,* 65 Cal.App.4th at p. 1449.)

In reviewing any order or judgment we also start with the presumption that the judgment or order is correct, and if the record is silent we indulge all reasonable inferences in support of the judgment or order. It is the appellant's burden to demonstrate error, and provide adequate citation to the record, and to present reasoned argument with citation to supporting legal authorities. The failure to meet this burden may result in this court deeming the claimed error to have been waived, or the court may affirm because the presumption in favor of the judgment has not been rebutted. (*Yield Dynamics, Inc. v. TEA Systems Corp*. (2007) 154 Cal.App.4th 547, 556-557.)

2. Adequacy of Hearing

Ronald contends he did not have an opportunity to question Conrad or Rudderow "in detail with reference to document and page and line or item number" of the declaration and documentation submitted in support of the fee petition. He therefore asks this court to reverse and remand for another hearing to allow him to present evidence in support of his objections.

The record simply does not support Ronald's contention. Although the trial court would have been within its discretion to refuse to hear Ronald's objections altogether because they were not filed until the day of the hearing in violation of Local Rules, rule 14.6(B), it nonetheless stated it would allow Ronald to present evidence. The only limitation the court placed on Ronald was that the evidence be relevant to his written

objections, which was entirely reasonable. Then, despite having initially stated he wanted to question Conrad and Rudderow "on some of their charges," Ronald did not call them as witnesses. We conclude Ronald had a full and fair opportunity to present evidence and simply failed to avail himself of the opportunity the court afforded him. Ronald's suggestion that the court should have "directed" him to "pose questions, in detail" is meritless. The trial court has no duty to advise a litigant on how best to present his case. As a party representing himself, Ronald is due the same consideration as any other party, but no greater. (*Monastero v. Los Angeles Transit Co.* (1955) 131 Cal.App.2d 156, 160; see also *Harding v. Collazo* (1986) 177 Cal.App.3d 1044, 1056.)

3. Fee Authorization

One of the factors a trial court may consider in exercising its discretion in awarding fees in a probate proceeding is whether the attorney's services have conferred a benefit on the estate. (*Estate of Stokley* (1980) 108 Cal.App.3d 461, 473.) Ronald generally asserts the fees incurred did not benefit the estate, but does not offer any coherent argument as to why that is so. We may deem this assertion waived on this ground alone. (*Yield Dynamics, Inc. v. TEA Systems Corp*., *supra*, 154 Cal.App.4th at pp. 556-557.)

In any case, Ronald's argument lacks merit. In accordance with California Rules of Court, rule 7.702, the third petition stated facts showing the estate benefited from the services Conrad provided. Specifically, in case Nos. A113999 and A116232, Conrad rendered services that resulted in final judgments affirming the probate court's orders. The third petition also stated the services Conrad provided in responding to the eight appeals and other petitions benefitted the estate by bringing it closer to closure. As we observed in our opinion in the prior consolidated appeals A11399 and A116232: "Given how long this probate proceeding has dragged on, we agree with the trial court that closure is a valid goal." That Ronald disagrees with the trial court's assessment of the benefit of these services to the estate at most demonstrates " 'an opportunity for a

difference of opinion,' " not an abuse of discretion. (*Estate of Gilkison, supra,* 65 Cal.App.4th at p. 1449.)

Ronald next argues the trial court abused its discretion by authorizing the payment of a retainer with respect to two of the appeals that were still pending. He asserts the court had no discretion to authorize retainer fees. But the only authority he cites for this proposition is California Rules of Court, rule 7.702. Rule 7.702 simply specifies the facts a petition for extraordinary compensation must include. It is silent on the subject of allowance of retainer fees. It is Ronald's burden, as the appellant, to demonstrate error and to provide citation to authority in support of the claim of error. (*Yield Dynamics, Inc. v. TEA Systems Corp., supra,* 154 Cal.App.4th at pp. 556-557.) Therefore, in the absence of any citation of authority to the contrary, we conclude the court's discretionary power to authorize compensation includes authorizing the payment of a retainer.

Finally, Ronald contends the amount of fees is "unconscionable" and excessive, especially when considered in relation to the modest size of the estate. Other than this conclusory assertion, Ronald does not explain why any specific amount requested is excessive, or unconscionable. Instead he simply asserts the petition "seeking payment of $135, 230.27 elicits more questions than the answers it provided." [5]

In support of the third petition, O'Keeffe submitted Rudderow's 12-page declaration, and 42 pages of itemized billing. It is not the function of this court to comb through this record in search of error. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 [" 'The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment.' "].) Since Ronald has failed to point to any specific time entry, rate or amount he contends was improper, we must presume the trial court duly reviewed all the documentation and considered the relevant legal factors.

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[5] We note Ronald does not reassert his contention below that fees for preparation of a fee petition are not allowable. In case No. A120213, we held a probate court has discretion to allow such fees. (See also *Estate of Trynin* (1989) 49 Cal.3d 868, 879.) In the absence of any argument on appeal, any such contention is waived.

As to the amount of fees incurred in relation to the size of the estate, we can only repeat the observation we have made in several of Ronald's prior appeals that "[t]he number of appeals Ronald has taken from this estate proceeding is excessive." This litigiousness has, of course, contributed to the fees incurred on behalf of the administrator. In any event, regardless of where the fault lies for the delay in bringing this estate to a close, it behooves the trial court and parties to "work towards bringing this proceeding to a merciful end before this estate is entirely consumed by the cost of further litigation."[6]

III. DISPOSITION

The August 1, 2008, order authorizing payment of fees is affirmed.

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Banke, J.

We concur:

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Marchiano, P. J.

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Margulies, J.

[6] For the first time in his reply brief, Ronald (a) raises a series of objections to statements in this court's opinion in *O'Keeffe v. Daley, supra,* A121671 and (b) asserts Judge Dearman displayed "blatant prejudice" against him in the proceedings below, not only with respect to the August 1, 2008 order, but also other orders that have been the subject of prior appeals. "[I]t is well settled appellate courts do not consider issues first presented in appellants reply briefs." (*Estate of Bennett* (2008) 163 Cal.App.4th 1303, 1312-1313.)